IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

CRL.A.No. 1919 of 2005

S.C.No.125/2002 of ADDL.SESSIONS COURT-II, KOZHIKODE
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APPELLANT/ACCUSED:
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1. ABDUL NAZAR, S/O. ABDULLA,
   NEELESWARAM AMSOM. (1ST ACCUSED).

2. SURA @ SURESH KUMAR,
   S/O. BALAN NAIR, NEELESWARAM AMSOM. (2ND ACCUSED).

3. KRISHNAN @ KRISHNA KUMAR,
   S/O. NARAYANAN NAIR, THIRUVAMBADI AMSOM.
   (3RD ACCUSED).

BY ADV. SRI.T.G.RAJENDRAN, SRI M. ASOKAN AND
SRI.DEVAPRASANTH.P.J.

RESPONDENTS: COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY S.H.O. MUKKOM POLICE STATION
(KODUVALLY CIRCLE), REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SHRI K.C. SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY and K.P.BALACHANDRAN, JJ.

Crl. Appeal No. 1919 of 2005 C

Dated this the 25th day of January, 2007

Judgment

Appellants in this case were charge-sheeted for offences punishable under section 341, 323, 120-B, 114 and 302 of the Indian Penal Code read with section 34 IPC. Along with these three appellants, another accused also faced trial. But, he (fourth accused) was found not guilty as there was no evidence adduced by the prosecution against him. No appeal has been filed by the State against the order of acquittal against the fourth accused. A1 to A3 were found guilty for the offences punishable under sections 341, 323 and 302 IPC. They were sentenced to undergo imprisonment for life and a fine of Rs.20,000/- under section 302 IPC and simple imprisonment for one month under section 341 IPC. No separate sentence was awarded for offences punishable under section 323 IPC.

2. According to the prosecution, accused persons belong to a trade union affiliated to BMS (Bharathiya Mazdoor Sangh). A portion of the estate called 'Thiruvambadi Estate', which was planted with

rubber, was given for slaughter tapping and the deceased Aboobacker was the supervisor for the slaughter tapping under the contractor. He refused to take members from the BMS union, but, engaged only members from CITU and INTUC unions for slaughter tapping and, therefore, BMS workers had got enmity towards him and the accused persons conspired to commit murder of Aboobacker and on 30.6.1999 at about 4.30 p.m. when Aboobacker came along with PW1 in a motor cycle, first accused slapped the deceased and he was hit with a brick by the third accused. The deceased was caught hold of by the second accused. First accused stabbed him with a knife on the chest of the deceased. He sustained grievous injuries to chest and he succumbed to the injuries. Hence, the charge sheet was filed.

3. PWs 1 to 3 are examined as occurrence witnesses. PW1, who came along with the deceased in the motor cycle, gave Ext.P1 first information statement. According to the first information statement, on 30.6.1999, at about 4 o'clock, he, along with Aboobacker started in the motor cycle of Aboobacker KL 11 E 9803 and reached by about 4.30 p.m. at the Thottathil Kadavu Angadi. He got down from the motor cycle. While

Aboobacker sitting in the motor cycle, A1 tried to take note of the number of the motor cycle. Aboobacker questioned him why he is taking the number and thereafter an altercation took place. First accused slapped Aboobacker and at that time his pen was slipped out from his pocket. He bent down as if he is taking his pen, but, the accused inflicted a stab injury on the chest by a dagger. By that time, A2 and A3 also came there and A2 caught hold of the hands of the deceased and A3 gave him a blow by a brick on the back of his neck. Then, he, along with PWs 2 and 3, took him and laid down on a table. Thereafter, he was taken to the Medical College Hospital and after examining him, doctor declared that Aboobacker was dead. He also described motive that BMS workers were not given job in the agricultural farm. He gave evidence, but, there was slight difference from the story given in the court. Before the court, first part of the incident till noting down of the number of the motor cycle, he gave same version as in Ext.P1. He stated further that immediately after he got down from the motor cycle, there was a push and pull and beatings. He stated as follows:

Thereafter, he stated that seeing this A2, A3 and A4 came there by running. A3 had a brick and he inflicted a block on the neck of the deceased. A2 caught hold of the hands of Aboobacker. At that time, the pen of A1 slipped down from his pocket and while taking the pen, he took the dagger from his waist and inflicted a stab injury. The contradiction pointed out by the counsel for the first accused is that in the first information statement it was stated that A2 and A3 came only after infliction of stab injury whereas in the deposition it was stated that A1 stabbed him only after A2 caught hold of the hands of the deceased and after infliction of injuries by brick by A3. In cross-examination, he also deposed that stab injury was inflicted upwards and after the above injury, nobody inflicted any injury on him:

He further deposed that after stopping the motor cycle, deceased went near A1. He cannot say whether deceased

went near A1 to beat him. He also stated that as soon as deceased went near to A1 there was clash and beatings. During clash, pen fell down.

His statement in Ext.P1 is that A2 and A3 used force to liberate A1 from the clutches of deceased and thereafter the there was group clash as marked in Ext.D1. It is not disputed that PWs 1 and 2 as well as deceased Aboobacker are friends and Aboobacker and PW1 came in the motor cycle and first information statement is the first information given regarding the incident and it is a very important document. According to the counsel for the appellant, the entire sequence has been changed in the deposition. The Public Prosecutor tried to justify saying that at the time of giving first information statement, mind of PW1 was disturbed because of the fatal

injuries sustained by his close friend, but, we cannot forget the fact that the entire sequence has completely been changed from Ext.P1 while giving oral evidence. If first information statement is believed, A2, A3 etc. came there only after the incident whereas the main sequence has been changed in the evidence of PW1. PW2 more or less corroborated the oral evidence adduced by PW1. Moreover, corroborated the evidence of PW2. But, according to PW2, A1 to A4 came together. According to PW2, as soon as deceased came in the motor cycle along with PW1, deceased gave wages to him. Immediately, Accused Nos.1 to 3 came in front of the motor cycle and the first accused started the writing of number of the bike and thereafter the incident happened. According to him, the second accused had a chain (MO5) with him and A3 had brick with him. PW3 came after the stab injury was inflicted and he has not seen the infliction of the stab injury. No evidence was adduced to show that A2 was having a chain with him apart from the solitary version of PW2. No evidence was also adduced to show that A2 inflicted any injury on the deceased with the chain. No injury is stated to have been inflicted with brick also. The chain was recovered from the place of incident. PW2

also deposed that first accused as trying to salvage himself from the clutches of the deceased.

4. MO1 knife was stated to have been recovered on the basis of the confession statement given by A1 and chemical examination report shows that it was stained with human blood. However, the court did not rely much on the same as there was no authorship of concealment in the confession statement. Apart from the fact that the dagger was found in an artificial way. But, a reading of 313 statement of A1 shows that he is not denying his presence. The dress of the accused recovered also contained human blood as per the chemical analysis report. It is the case of the accused that he was also injured and his dress was stained with human blood. According to the prosecution, there was only one stab injury. Evidence of PWs 1 and 2 is consistent with the above version. Out of the two wounds recorded by the doctor, one is incidental. Even though no specific question was asked or no statement was given by the doctor that the injury inflicted is sufficient in the ordinary course of nature to cause death, the description

given in the postmortem report shows that it is a very serious injury and doctor stated that the injury on the chest was the cause of death. A2 and A3 denied their involvement in the incident. It is contended by the learned counsel for the accused that even though the incident occurred in a bazar, no independent witness was examined. Investigating officer has stated he has questioned the people in the nearby place, but, they denied that they have seen the incident. It is a reasonable explanation why independent witness was not examined. Merely because eye witnesses are relatives or friends, their evidence cannot be discarded as they are natural witnesses, but, at the same time, their evidence requires scrutiny.

5. Defence of A1 was that the accused along with PWs 1 and 2 came there for attacking and A1 has suffered very serious injuries. PW13, investigating officer, has stated that A1 was also hospitalised after the incident and he was arrested only after three days when he was discharged from the hospital and wound certificate was collected by him and it was in the files, but, the above wound certificate was not produced at all. According to the first accused in the 313 statement he

had suffered injuries and one tooth was broken and various other injuries were also caused to him in the incident. It is the case of the accused that they were not carrying the chain and the chain recovered from the place of incident might have been carried by the deceased or his friends. Further, there was a fight between the accused and the others. According to the accused, the stab injury inflicted on A1 might have been inflicted by PWs 1 or 2 accidentally as that stab injury was evaded by him. There was no defence evidence adduced in this case. A close scrutiny of the first information statement as well as the evidence of PWs 1 and 2 would show that in view of the dispute regarding engagement of workers, there was a clash between the deceased and PWs 1 and 2 on the one side and others on the other side and in that process A1 has inflicted the stab injury on the deceased in that fight. A1 has also suffered injuries even though the injuries were suppressed by the prosecution as otherwise investigating officer should have produced the wound certificate. Admittedly, the accused was in the hospital for three days and from there he was produced before the Magistrate's court. Non-explanation of injuries on the accused and non-production of his wound

certificate even after investigating officer was questioned shows that prosecution was suppressing some bit of facts. (See: Lakshmi Singh and others v. State of Bihar - AIR 1976 SC 2263 and Rajendra Singh and others v. State of Bihar - AIR 2000 SC 1779). Yes, it is the duty of the court to find out truth. According to the prosecution, there was only one stab injury. Taking into account the fact that there was only one stab injury, the evidence adduced by PWs 1 and 2 show that there was a push and pull and during the scuffle, incident occurred and it was not a pre-planned murder. Even according to PW2, A1 was trying to salvage himself from the clutches of the deceased. Everything happened when the deceased got down from the motor cycle and started questioning A1 regarding noting down of the number of the motor cycle. We are of the opinion that this injury was caused during the sudden fight. Considering the nature of injuries and considering the suppression of wound certificate of A1, we are of the opinion that A1 can be punished only for the offences punishable under section 304 Part II IPC and, therefore, we set aside the conviction and sentence of A1 under section 302 IPC and his conviction and sentence is

modified to that of 304 Part II IPC. He was caught hold of by the deceased and he wanted himself to escape. But, he exercised his right of private defence even if his defence is accepted. Considering the facts and circumstances of the case, he is sentenced to undergo imprisonment for five years. He will also be entitled to the right of set off. Medical evidence would show that any injury was inflicted with a brick or chain on the deceased. Even though considering the evidence, presence of A2 and A3 cannot be disputed, there is no evidence to show that they shared any common intention to murder the deceased or they knew that even A1 was possessing a dagger at all. They wanted to question it and threaten the deceased demanding employment of slaughter tapping. In this connection, we refer to the decision of the Apex Court in Ajai Sharma v. State of Rajasthan ((1999) 1 SCC 174) and Jai Narain Mishra and others v. State of Bihar - ((1971) 3 SCC 762). At the maximum, considering the overt act allegedly committed by them, they can be convicted under section 323 IPC, but, they have already suffered punishment for about two years and the imprisonment they suffered already is sufficient sentence for A2 and A3.

In the above circumstances, appeal is allowed partly. The conviction and sentence of A1 under section 302 of the Indian Penal Code is set aside. A1 is convicted for offence punishable under section 304 Part II IPC and he is sentenced to undergo rigorous imprisonment for five years. Conviction and sentence of A2 and A3 under section 302 read with section 34 IPC is set aside and they are convicted under section 323 IPC and sentenced to undergo imprisonment for one year under section 323 IPC. Appellants are entitled to the benefit of set off. Since A2 and A3 have already suffered the sentence, they should be set free forthwith, if they are not required in any other case.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

vaa

J.B. KOSHY AND
K.P.BALACHANDRAN, JJ.

Crl.Appeal No.1919/2007

Judgment

Dated:25th January, 2007